YAU HENG FANG

v.

PUBLIC PROSECUTOR

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
GEORGE SEAH SCJ
MOHD. AZMI SCJ
[CRIMINAL APPEAL NO. 41 OF 1983]
22 APRIL 1985

CRIMINAL LAW AND PROCEDURE: *Murder charge - Amended to charge of culpable homicide not amounting to murder - Jury discharged without giving verdict - Accused sentenced to 10 years' imprisonment - Whether trial a nullity - Alibi - Burden of proof - Evidence - Identification of accused.*

The appellant was originally charged for the murder of Yap Sim Poh but at the end of the prosecution's case, the charge was amended to culpable homicide not amounting to murder for which he was found guilty and sentenced to 10 years' imprisonment. After the charge was amended, the trial Judge discharged the jury who had not returned a verdict. The appellant consequently claimed that he was not lawfully convicted and sentenced and therefore the trial was a nullity.

There were material discrepancies between the two eye-witnesses who identified the appellant as the person who inflicted wounds on the deceased. The evidence of the police officer who arrived at the scene was that visibility was poor on the night of the killing. Also no trace of blood was found at the spot of the purported infliction of injuries. The appellant appealed against the conviction on the grounds of the identity of the appellant and the rejection of the defence of alibi by the learned trial Judge.

Held:

[1] Whenever a charge of murder is amended to a lesser charge which does not carry the death sentence, the proper procedure to be adopted is for the trial Judge to discharge the jury and proceed to hear the case under Chapter XX of the Criminal Procedure Code.

[2] As a matter of established practice in criminal procedure, the jury was properly discharged in this case when the murder charge was amended to culpable homicide not amounting to murder and the fact that the jury empanelled at the commencement of the trial did not give a verdict, would not render the trial a nullity.

[3] From the poor opportunity for the eye-witnesses to recognise the appellant and their poor quality as identity witnesses, their testimony on the issue of identity must be held to be inherently incredible.

[4] No *prima facie* case had been established and the appellant should have been acquitted without his defence being called.

[Appeal allowed. Conviction quashed. Sentence set aside.]

Cases referred to:
R v. Hancock [1932] 23 CAR 16
R v. Heyes [1951] 1 KB 31
Mahbub Shah v. King Emperor [1945] AIR PC 118
R v. Turnbull [1976] 3 All ER 549
Woolmington v. DPP [1935] AC 462
R v. Johnson [1961] 46 Cr App R 55
R v. Stebbing [1962] Cr LR 472
Liew Chin Seong v. Rex [1952] MLJ 236
Watt or Thomas v. Thomas [1947] AC 484

Legislation referred to:
Criminal Procedure Code, ss. 200, 210(ii), 232(i), 402A, 402A(1), (2)
Penal Code, ss. 34, 302, 304

For the appellant - N. Saraswathy Devi
For the respondent - Tee Hong Geok; DPP

JUDGMENT

Mohd. Azmi FJ:

The appellant was convicted at the High Court, Kuala Lumpur on a charge of culpable homicide not amounting to murder with three others still at large, an offence under the first limb of s. 304 read with s. 34 of the Penal Code and sentenced to 10 years' imprisonment to take effect from the date of his arrest. He was originally charged under s. 302 read with s. 34 of the Penal Code for the murder of Yap Sim Poh but at the close of the case for prosecution, the charge was amended to the lesser charge for which he was found guilty and convicted. The appellant who at the relevant time lived in Kuala Lumpur and worked as a fishmonger at Petaling Jaya Market, was alleged to have committed the offence with three others still at large on 12 May 1980 at about 9.30 p.m. at Jalan Peria, Sekinchan in the District of Sabak Bernam. He now appeals against conviction and sentence.

Although Datin Saraswathy Devi for the appellant has raised a number of grounds as to why the conviction cannot be sustained, we propose to deal only with two matters which we think are sufficiently material to merit our consideration.

The first is the argument that the trial was a nullity on the ground that the appellant having been given in charge to the jury in accordance with s. 210(ii) Criminal Procedure Code, the remaining provisions of Chapter XXII of the Code including the requirement for the jury to return a verdict were never complied with and as such the appellant was not lawfully convicted and sentenced. If this nullity argument succeeds then it would follow that a retrial should be ordered before a single Judge and not before a new jury as the offence under s. 304 of the Penal Code is not punishable with death and trial by jury under Chapter XXII cannot thus apply. From the Appeal Record, it cannot be disputed that the appellant was originally charged under s. 302 Penal Code which provides: "Whoever commits murder shall be punished with death". In the result he was tried by jury before the High Court as required by s. 200 CPC which states: "In all cases where the punishment of death is authorised by law the accused shall be tried by jury". Section 210(ii) then provides:

> The Registrar shall then give the prisoner in charge to the jury saying the following words: "Gentlemen of the Jury, the prisoner stands charged by the name of A.B. for that he on the (here he shall recite the charge). Upon this charge he has been arraigned and on his arraignment he has claimed to be tried. Your charge therefore is to inquire whether he is guilty or not guilty and to hearken to the evidence."

What then is the procedure to be adopted when the charge upon which an accused person has been arraigned is amended to a lesser charge which does not carry the death penalty? The CPC appears to be silent on this point but we are of the view the answer is self-evident in the Code itself. It should be noted that our CPC provides three modes of criminal trial in the High Court - (1) trial without assessors before a single Judge (Cap XX); (2) trial with the aid of assessors (Cap XXI); and (3) trial by jury (Cap XXII). The application of jury trial in this country is limited to the States of West Malaysia, and unlike in England, only where the offence is punishable with death that the accused shall be tried by jury. Further, specific legislation like the internal Security Act, 1960 and the Dangerous Drugs Act, 1952 have excluded jury trial even in capital cases. In practical terms jury trial is available in this country only where the charge is murder under s. 302 Penal Code and where the trial is held in West Malaysia. In the present appeal, the appellant was properly tried before a jury when the charge against him was one for murder. But when the charge was reduced to s. 304 at the close of case for prosecution, the offence ceased to carry the death penalty and by virtue of s. 200 CPC the appellant should no longer be tried before jury. The requirement of s. 232(i) for the jury to return a verdict "on all the charges on which the accused is tried" must be read in the context of s. 210(ii) i.e. charges upon which the accused has been arraigned when the Registrar gives the accused in charge to the jury, and by virtue of s. 200 such charges can only relate to offences punishable with death. It is therefore our judgment that whenever a charge of murder is amended to a lesser charge which does not carry the death sentence, the proper procedure to be adopted is for the trial Judge to discharge the jury and proceed to hear the case under Chapter XX of the CPC. In the circumstances, we are of the view that the learned Judge was correct in law in discharging the jury after the charge was amended and in proceeding to hear the case without jury. The learned Counsel for the appellant has not produced a single local authority to support her argument that the trial was a nullity. As far as we are aware what the learned Judge did has been the established practice in the High Court of West Malaysia and we see no reason to depart from such practice. Although the learned trial Judge's Notes of Evidence did not specifically show that the jury had been discharged, the disappearance of any reference to jury after the charge was amended could only mean that they must have been discharged. Indeed, Datin Devi has conceded that the jury must have been discharged and from what she told us from the Bar her own notes at the trial read, "the Judge dismissed jury without consulting me". She has also admitted that at the trial she thought the Judge was right in discharging the jury. A number of English cases has been referred to us pertaining to the necessity of jury to return a verdict once empanelled. In *Reg v. Charlesworth* Cox's Criminal Law Cases Vol. IX (1861 - 64) 44 @ 55, it was held that the Judge was wrong in discharging the jury without giving a verdict. Other cases that we have found on similar point are *R v. Hancock* [1932] 23 CAR 16 a*nd R v. Heyes* [1951] 1 KB 31. We think reference to English authorities on this point can be of no assistance since jury trial in England is of general application in all criminal trials involving a felony, and the provision of s. 200 in our CPC is completely unknown in England. In the result we hold that as a matter of established practice in criminal procedure, the jury was properly

discharged in this case when the murder charge was amended to culpable homicide not amounting to murder and the fact that the jury empanelled at the commencement of the trial did not give a verdict, would not render the trial a nullity.

The second part of the argument is on the merit of the prosecution case. Various grounds are raised to show why the conviction cannot be sustained. One main ground is centered on the identity of the appellant, and another ground is the rejection of the defence of alibi by the learned Judge. For the purpose of this appeal, we propose to deal mainly with the issue of identification of the appellant as one of the assailants.

The evidence adduced by the prosecution showed that a fight had taken place in the town of Sekinchan on the night of 12 May 1980. This was borne out by the first information report (Ex. P1). There was no dispute that the deceased Yap Sim Poh aged 23 years was killed in the incident and that his body was found by the side of Jalan Peria near a basketball Court at the point marked "X" in the sketch plan (Ex. P8). There was no direct evidence how the deceased's body came to be there although two principal witnesses for the prosecution - Yap Seng Hoo (PW9) and Ong Kok Pin (PW10) had testified that they saw the deceased being stabbed in front of "Lily" Hairdressing Saloon by the accused at about 9.30 p.m. In particular, PW9 who is the younger brother of the deceased was emphatic that he saw appellant stab the deceased once in front of "Lily" with a 3-edged knife, and after falling down, the deceased got up and ran when he was chased by 4 or 5 persons. Medical evidence of Dr. Arulnathan (PW7) showed that the cause of deceased's death was multiple stab wounds penetrating the brain with laceration of the brain. *Inter alia*, there were four puncture wounds on the deceased's head penetrating the brain. In the circumstances it was reasonable to infer from the evidence of PW9 and PW10 that the deceased was first attacked on the night in question in front of "Lily"; and he was then chased by his assailants and stabbed again several times before he finally collapsed at point "X", a distance of about 164 feet from "Lily" (see A to X in the key to the sketch plan). Except for the initial fighting in front of "Lily", no one knew how the deceased met his final fate at Jalan Peria. However, since the charge- both original and amended - against the appellant had reference to s. 34 of the Penal Code, it is unnecessary for the prosecution to prove which particular stab wounds were inflicted by which assailant. So long as it is shown that the criminal act was done by one of the assailants in furtherance of a common intention of all, then liability for the crime would be imposed on anyone of the persons in the same manner as if the act were done by him alone (see *Mahbub Shah v. King Emperor* [1945] AIR PC 118). The appellant denied that he was involved in the fight. He denied stabbing the deceased as alleged by PW9 and PW10 . He raised a defence of alibi after giving the prosecution the requisite notice under s. 402A CPC. It was his defence that at the time of the commission of the crime he was in a cinema at Sekinchan Town together with his uncle (Hong Chong) and two close friends (Kam Sun [DW3] and Ah Poh). On the issue of identification of the appellant by the two witnesses, the learned Judge dealt with it in the following manner as regards PW9:

> The incident took place at about 9.30 p.m. It was urged by the defence that the identity of the accused was in question. It was said that the place was dark, and the principal witnesses had contradicted themselves. It was pointed out that PW9 said that he saw the accused stabbed the deceased on the head whereas at the Preliminary Enquiry he said he saw him stabbed at the back. Although, it appeared to me that there was a material contradiction this was really not so because the witness said the deceased was attacked with a knife, from the back, and PW10 said the deceased was stabbed on the head. PW9

explained that at the Preliminary Enquiry he was not really thinking about the incident but of his work and the deceased, his own brother who had just died. PW9 said he saw the deceased about to be stabbed by the accused at a distance of about 25 feet. The accused had also been identified by PW9 at the Identification Parade.

As for PW10, his evidence was dealt with as follows:

PW10 confirmed what PW9 said about the attack. He denied Counsel's suggestion that he did not see the incident and the accused because he had seen the accused before at about 10 times in Sekinchan. He said the accused used to frequent an ice-stall where he also frequented. Although at a later stage he did say he was not sure whether the accused stabbed the deceased because it happened so long ago, in re-examination he explained that what he meant was he saw the accused stabbed but he did not know whether he was stabbed to death or not. He emphasised he could see the incident clearly because he turned round to look at the deceased when half of his body was turned at the time. He recalled the incident took place in front of Lily and the shop was still opened and the lights were still on. He was about 10 feet from the deceased when the incident happened. The police PW6 said the visibility was about 30 feet.

I was therefore satisfied at the close of the Prosecution's case that a *prima facie* case had been established under s. 304 of the Penal Code against the accused and called for his defence.

Although we find nothing unsatisfactory in the way Deputy OCPD Abu Samah (PW2) had conducted the identification parade held on 26 June 1980 - i.e. about 5 days after the arrest of the appellant, no extra weight should be attached to the evidence of identification by PW9 since in any event he claimed that he had known the appellant by sight well before the incident. On the basis that a witness cannot corroborate himself, the identification at the parade cannot constitute corroboration of his testimony in the witness box on the issue of identity of the appellant. In our view, what the learned Judge had failed to direct his mind is the question of whether at the material time when PW9 and PW10 alleged to have seen the stabbing, there was in fact opportunity for them to recognize the appellant as the assailant. Although there was corroboration in PW9's evidence as regards the weapon used by the particular assailant whom he saw, inadequate consideration was given not only as to the identity of that assailant but also as to whether any stabbing had in fact taken place in front of "Lily". All the punctured wounds inflicted on the deceased were triquestrous in nature. The wounds had three edges which were consistent with being caused by bearing scraper or instrument of similar nature according to the evidence of Dr. Arulnathan. In this case there can be no doubt that there was a gang fight on the night in question. Both PW9 and PW10 were themselves injured in the incident although they could not identify their own assailants. According to Yau Cheng (DW2), about 10 persons were involved in the fight but he was not in a position to testify whether the appellant was one of the combatants. From the unchallenged evidence of Detective Corporal Wong Peng Sum (PW1) - the first police officer to arrive at the scene at 10.00 p.m. - the irresistible inference would be that on the night of the incident, visibility was such that both PW9 and PW10 could not have identified or recognized the appellant even if he were known to them by sight. According to Detective Corporal Wong, "One can recognise a person about 6 ft. away 6 ft. is the distance from the person whom I know. A person whom I do not know it would be about 12 ft. away". What he meant, of course, was the other way round, viz a known person

could be recognized from 12 feet and an unknown person from 6 feet. In fact Detective Corporal Wong was using a torch-light when he carried out investigation at the scene half an hour after the incident and there was no evidence on record that visibility in front of Lily shop had changed materially during that half an hour. It is true that DSP Fuad (PW6) did testify that visibility was 30 ft. but unlike Detective Corporal Wong, he arrived at the scene at 1.00 a.m. on 13 May i.e. hours after the incident. It should be noted that the deceased was supposed to have been stabbed on the head with a 3-edged weapon for the first time in front of Lily shop as he was leaving on his motor cycle. Yet the police did not find any trace of blood there; nor was his motor cycle taken by the police for investigation. The absence of blood was never explained and in our view the only reasonable inference to be drawn would be that no stabbing on the head could have taken place in front of Lily shop although the fight started there. As adverted to earlier, point "X" was only about 164 feet away from "Lily" and in view of their proximity visibility must be almost the same at both places. In the circumstances, when PW9 testified that he saw the appellant stabbing the deceased from a distance of 25 feet, that could not have been possible. Failure to consider PW9 and PW10's evidence in the light of PW1's testimony is fatal in this case. In our judgment it would be impossible for both PW9 and PW10 to have identified the appellant as the assailant. Further at p. 17 of Appeal Record, the learned Judge agreed with Counsel for the appellant that there were serious discrepancies between PW9's evidence at the Preliminary Enquiry and at the trial. One of the material discrepancies was that at the Preliminary Enquiry, PW9 said he did not see who inflicted the injury on the head of the deceased, but at the trial he was able to identify the appellant. The learned Judge however accepted PW9's explanation to the effect that at the Preliminary Enquiry he could not remember because of the sudden death of his brother and also due to his work as a fisherman. In our judgment the explanation ought to have been rejected. If PW9 could not recognize the assailant during the Preliminary Enquiry which was nearer in point of time to the incident, how could he possibly recognize him as the assailant at the trial? As regards the other material witness PW10, he concluded his testimony in cross-examination (at p. 24 of Appeal Record) by admitting that he was not sure whether the appellant stabbed the deceased because it happened so long ago. In our view the explanation given by PW10 in re-examination of what he meant should also have been rejected by the learned Judge. The question whether the deceased was stabbed to death or not is irrelevant on the issue of identity of the assailant. Thus although he claimed to have seen the deceased from a distance of 10 feet, he was in fact not sure of appellant's complicity in the crime.

These are the qualities of the material witnesses for the prosecution which the Court was persuaded to rely on the issue of identification and recognition. If the prosecution depends solely, as in the present case, upon visual identification by one or more witnesses, the Judge must withdraw the case from the jury if the evidence is of poor quality (see *R v. Turnbull* [1976] 3 All ER 549 @ 553). In our opinion, both from the poor opportunity for the eye-witnesses to recognize the appellant and their poor quality as identity witnesses, their testimony on the issue of identity must be held to be inherently incredible. In the absence of evidence to connect the appellant with the crime, which is an essential element in any criminal prosecution, no *prima facie* case could have been established by the prosecution and the appellant should therefore have been acquitted without his defence being called. As such there is no necessity for us to deal with the defence of alibi.

Be that as it may, there is one matter we wish to observe regarding burden of proof. In rejecting the defence of alibi, the learned Judge had this to say at p. 9 of his judgment:

> The defence had thus not created a reasonable doubt in my mind as to the accused's innocence. He was therefore found guilty and sentenced to 10 years' imprisonment with effect from the date of his arrest, i.e., 21 June 1980.

If by that statement the learned Judge intended to cast a new statutory burden on the appellant in establishing his alibi by virtue of s. 402A(2) CPC, then he had misdirected himself in law. In all criminal trials the accused is deemed to be innocent until proven guilty by the prosecution. There is no burden placed on the accused to prove his innocence. Since *Woolmington v. DPP* [1935] AC 462 was decided in 1935, the only defence in England that placed a legal burden of proof on the balance of probabilities on the accused is the defence of insanity. Other defences such as alibi placed merely an evidential burden of introducing some evidence enough to create a reasonable doubt in the minds of the jury (see *R v. Johnson* [1961] 46 Cr App R 55 and *R v. Stebbing* [1962] Cr LR 472). In this country we have been applying the "reasonable doubt" test in alibi cases as laid down by Sir Charles Murray-Aynsley CJ in *Liew Chin Seong v. Rex* [1952] MLJ 236. Section 402A(2) CPC provides:

> The notice required by subsection (1) shall include particulars of the place where the accused claims to have been at the time of the commission of the offence with which he is charged, together with the names and addresses of any witnesses whom he intends to call for the purpose of establishing his alibi.

It may be argued that because of the words "establishing his alibi", there is now a statutory burden placed on the accused so that since 10 January 1976 when the new section was introduced by Act A324, an accused person has to prove his alibi on the balance of probabilities. The object of s. 402A(1) is to make provision for a written notice to be given by the Defence to the Public Prosecutor if the defence of alibi is to be raised at the trial, and s. 402A(2) merely provides the particulars required to be given in such notice. Nothing more should be read in that section, and we do not think that it is the intention of the legislature by that section in the CPC to introduce a new legal burden on the accused to establish his defence. It is of course for the defence to adduce evidence to establish the defence of alibi, but there is nothing in the section to justify the interpretation that the "reasonable doubt" test has now been replaced by a statutory burden placed on the accused to prove his alibi on the balance of probabilities. In our judgment the test has not changed. What the learned Judge should consider is whether the evidence adduced by the appellant for the purpose of establishing his alibi had raised a reasonable doubt in the prosecution case, and not whether such evidence had created a reasonable doubt as to the appellant's innocence. It must be because of this misdirection on the law that learned Counsel for the appellant has complained that the learned Judge appeared to have required a higher standard from alibi witnesses than prosecution witnesses. She goes on to complain that the learned Judge went to the extent of arguing that even if the appellant had gone to the cinema he might have sneaked out in the middle of the film show; committed the crime; and then went back to the cinema. The learned Judge also provided a motive for the killing. From the Appeal Record, we agree that these suggestions regarding sneaking out of the cinema and the motive for the killing were mere conjectures and never formed any part of the prosecution case, and nor were they put to defence witnesses in cross-examination.

It is true that sitting an appellate Court, not to have seen the witnesses, puts us in position of disadvantage as against the trial Judge, but in our view this is the type of cases referred to by Lord Thankerton in *Watt or Thomas v. Thomas* [1947] AC 484 @ 487 and applied by Privy Council in *Kim Guan & Co. Sdn. Bhd. v. Yong Nyee Fan & Sons Sdn. Bhd.* Privy Council Appeal No. 32/80, where any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses could not be sufficient to explain and justify the trial Judge's conclusion on identification and recognition of the appellant as one of the assailants.

This appeal is allowed. The conviction is quashed and the 10-year sentence is set aside.

Also found at [1985] 2 CLJ 22

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